84-894 (2)

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No.

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

THOMAS FOGEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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39 pp

QUESTIONS PRESENTED

1.

Whether this case involves an issue also presented in the pending case of Oklahoma v. Castleberry (No. 83-2126, cert. granted, No. 5, 1984).

2.

Whether the automobile exception to the search warrant requirement applies to the search of a vehicle which has just been parked and left by a suspect.

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STATE OF ILLINOIS,

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THOMAS FOGEL,

Respondent.

PETITION FOR A WRIT
OF CERTIORARI TO THE
APPELLATE COURT OF
ILLINOIS, FIRST DISTRICT

Petitioner, the State of Illinois, respectfully prays that a Writ Of Certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, which was entered on June 29, 1984.

OPINION BELOW

The unpublished opinion and order of the Appellate Court of Illinois, First District is reproduced as Appendix A to this Petition. The order of the Illinois Supreme Court denying leave to appeal from that decision is reproduced as Appendix B to the Petition.

JURISDICTION

The opinion, order and judgment of the Appellate Court of Illinois, First District was entered on June 29, 1984. The order of the Illinois Supreme Court denying leave to appeal from that decision was entered on October 2, 1984. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The jurisdiction of this Court in invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

UNITED STATES CONSTITUTION - FOURTH AMENDMENT:

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Certain police officers discovered 68 pounds of marijuana during a search of the automobile of respondent Thomas Fogel. After a hearing on respondent's motion to suppress, the trial court suppressed that evidence. (R. 58) The Appellate Court of Illinois, First District, affirmed the order suppressing evidence and the Illinois Supreme Court denied leave to appeal. (Appendices A and B) The State of Illinois now seeks review by this Court.

On December 27, 1982, Chicago Police Officer Robert Smith obtained a search warrant for respondent's person and for respondent's house in Glenview, Illinois. (R. 69) The affidavit for the warrant recited that a reliable informant had helped respondent carry two large bags of

marijuana from the trunk of a car into the house. (R. 70-71)

On the afternoon of December 28, Officer Smith and other Chicago Police officers arrived at respondent's house. Respondent was not there, but a man inside the house refused entry to the officers, so they had to force their way in. (R. 18-19) The officers searched the house for an hour and a half, but discovered nothing. (R. 20)

As the officers were finishing their search, respondent and his wife arrived at the door of the house. The officers stopped them, and saw that respondent's car, which had not been present when the officers arrived, was parked 20 to 25 feet away in the driveway. (R. 21-22, 25) Respondent was searched, and two bags of marijuana and a bag on cocaine were re-

covered from his briefcase. (R. 22-23) $2,865 in cash was recovered from the purse of respondent's wife. (R. 28)

Officer Smith then took the keys to the car from respondent and searched the vehicle. (R. 25) In the trunk he found two large plastic trash bags filled with marijuana. (R. 25-26)

After laboratory test results were returned, respondent was charged with possession of marijuana with intent to deliver and with possession of cocaine. (R. 75-77) The trial court suppressed the evidence recovered from the trunk of respondent's automobile, and the State appealed from that decision. (R. 95)

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN ISSUE ALSO INVOLVED IN OKLAHOMA V. CASTLEBERRY, NOW PENDING BEFORE THIS COURT.

On November 5, 1984, this Court granted certiorari in a case involving the same question as that presented in this matter. Oklahoma v. Castleberry, (No. 83-2126, cert. granted, Nov. 5, 1984). That question is whether the automobile exception to the search warrant applies when police officers arrest a suspect outside a parked car and the officers have probable cause to search the vehicle.

In Castleberry, the officers, acting on a tip, arrested a suspect on drug

charges. At the time of the arrest the suspect threw a small object into the interior of his parked automobile and locked the car door. The officers, using the suspect's keys, searched the interior of the automobile and the trunk, and recovered narcotics. The Oklahoma Court of Criminal Appeals ruled that a warrant had been necessary to justify a search of the automobile. Castleberry v. State, 678 P.2d 720 (Okla. Crim. 1984). This Court accepted jurisdiction, partly in order to decide if the search fell within the automobile exception to the search warrant requirement.

This Illinois case present similar facts and legal issues. Here also the police officers encountered a suspect outside his parked automobile. Here also the officers lawfully arrested the suspect and used the suspect's keys to search the

trunk of the vehicle. Here also contraband was recovered from the truck. Here also the state reviewing Court held that the search of the trunk was unlawful as it had been performed without a warrant.

Therefore, certiorari may be granted in this case without consuming a large amount of this Court's scare time and resources. This case could either be consolidated with Castleberry or be given a summary disposition after Castleberry is decided.

II.

THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT APPLIES TO THE SEARCH OF A VEHICLE WHICH HAS JUST BEEN PARKED AND LEFT BY A SUSPECT.

It is clear that under the automobile exception to the search warrant requirement the police may perform a warrantless search of a vehicle they have stopped on a highway. It is less clear whether that exception can apply to a parked automobile. This Court should grant certiorari in order to resolve this important Fourth Amendment issue.

Here, the police were performing a lawful search of respondent's house when respondent unexpectedly drove up in his automobile and parked it. The officers, who had a search warrant for respondent's

person, searched respondent and found cocaine and marijuana. At that point the officers had both probable cause to arrest respondent and probable cause to search the automobile. Using respondent's keys, the officers searched the trunk and recovered 68 pounds of marjuana.

After the officers had arrested respondent, there were two things they could have done with respondent's automobile. The first would have been to impound the vehicle pending an application for a search warrant. The second was to perform an immediate search of the vehicle. The decisions of this Court indicate that the officers acted correctly in deciding to make an immediate search. Under the automobile exception to the search warrant requirement, officers with probable cause to search a vehicle may perform an im-

mediate search, and do not have to impound the vehicle and apply for a warrant.

Numerous decisions of this Court hold that when police officers encounter an automobile and have probable cause to search, they may search the vehicle without a warrant. Michigan v. Thomas, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980); Texas v. White, 423 U.S. 67, 92 S.Ct. 304, 46 L.Ed.2d 209 (1975); Cady v. Dombrowski, 413 US. 433, 93 S.Ct. 2523, 37 L.Ed.706 (1973); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 28 L.Ed.2d 419 (1970).

Thus there is a well established automobile exception to the search warrant requirement. Usually that exception is applied to moving vehicles stopped by the

police on a highway, but the exception is not restricted to such cases. In the Bannister decision a warrantless search of an automobile was held valid, even though the vehicle was standing at a gas station when the officer approached it. Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980). In White the automobile exception to the search warrant requirement was applied after a vehicle was stopped at a drive-in window of a bank. Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed. 2d 209 (1975). In Caldwell, a warrantless exterior search of an automobile was held proper after the car had been towed from a public parking lot. Caldwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). And in Cady a warrantless search of an automobile was held valid after the vacant vehicle had been towed following an

accident. Cady v. Dombrowksi, 413 U.S. 433, 93 S.ct. 2523, 37 L.Ed.2d 706 (1973).

By those standards the search in this case fell within the automobile exception to the search warrant requirement. The officers did not enter into respondent's property to search his automobile, but instead entered to execute a lawful search warrant for the house. The officers to not seek out respondent's car, but instead the vehicle unexpectedly arrived at the scene. The officers did not have probable cause to search the automobile until shortly before that search was performed. The automobile exception to the search warrant requirement exists because of the inherent mobility of vehicles and because of the diminished expectation of privacy which surrounds them. United States v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53

L.Ed.2d 538, 549 (1977). But, as stated in Chadwick, that exception applies even after the vehicle had been immobilized. Therefore when police officers unexpectedly encounter an automobile and have probable cause to search it, they may perform a immediate search even if the vehicle is parked and the owner had stepped out of it.

Such a search is reasonable under the Fourth Amendment because impounding the vehicle pending an application for a warrant would involved a greater intrusion on the owner's privacy rights than an immediate search. As this Court said in Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970)

> For constitutional purposes, we see no difference between on the one had seizing and holding a car before presenting the probable case to a magistrate and on the other hand carrying out an immediate search

without a warrant.

If the officers had impounded respondent's automobile pending an application for a warrant, the car would either have been towed or the police would have posted guard on it, probably overnight. This would have created a greater intrusion on respondent's privacy rights than the warrantless search. Therefore, a warrantless search was reasonable under the circumstances of this case.

It is true that in the Coolidge decision four justices of this Court indicated that police officers may not enter onto a suspect's property to search an automobile when there is time and opportunity to seek a warrant. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Here, however, the officers did not enter into respondent's property to

search his vehicle, but to execute a lawful warrant to search respondent's house and person. The automobile was not present when the officers arrived, but appeared without warning while the officers were searching the house. After the officers first saw the automobile, they could have obtained a warrant only after impounding it.

The fact that the officers did obtain a search warrant for respondent's house and person shows that the officers were not trying to evade the search warrant requirement. Moreover, the officers were justified in not seeking authority to search respondent's automobile at the time they applied for the warrant. Although the informant had seen respondent removing a large quantity of marijuana from the car the previous day, when the officers applied

for the warrant they had no information indicating that nay contraband was still in the vehicle. (R. 70-71) Also, neither the affidavit nor anything else in the record indicates that the informant supplied a description of the automobile. (R. 70-71) The application for the warrant had to give both a specific description of the place to be searched and information indicating that evidence was presently to be found there. Ill. Rev. Stat. 1971, ch. 38, sec. 108-1. When Officer Smith applied for a search warrant, such information was not available concerning respondent's automobile.

But after respondent was searched and placed under arrest, there was probable cause to search his vehicle. The large quantity of marijuana seen by the informant had not been found in the house. The previous day respondent had transported the

marijuana to the house in his car, and respondent had just arrived at the house in his car again. Smaller quantities of cocaine and marijuana were found on respondent's person, and several thousand dollars were found in his wife's purse. Thus the officers searched respondent's automobile as soon as they acquired probable cause to believe that it contained contraband.

Here the officers, after they acquired probable cause, searched an automobile which had just been parked and left by respondent. This Court should accpet jurisidiction in order to resolve the important question of whether the automobile exception to the search warrant requirement applies to such searches.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Apellate Court of Illinois, First District.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Appellate Court of Illinois, First District in People v. Thomas Fogel, (Unpublished Order, No. 83-1517, June 29, 1984).

June 29, 1984

83-1517

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
THOMAS FOGEL, Defendant-Appellee.	)	Honorable Paul A. O'Malley. Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

The defendant was charged with unlawful possession with intent to deliver more than 500 grams of marijuana recovered from his automobile trunk, possession of less than 30 grams of cocaine recovered from his person, and possession with intent to deliver between 30 and 500 grams of mari-

juana also recovered from his person. His pretrial motion to suppress the evidence obtained from the search of his automobile trunk was sustained. The State has appealed that ruling, asserting that the search of the defendant's automobile trunk was justified.

At the hearing, the State introduced as evidence a complaint for a search warrant and the search warrant itself.[1] In the complaint the arresting police officer stated that an informant, who previously had proved to be reliable, told him that he helped carry two large plastic bags from the defendant's car to his house. Inside the defendant's house, the informant saw that the bag contained marijuana; he also

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1 Although there was some question raised later at the hearing as to whether the complaint was admitted as an exhibit, we find that it was properly admitted and that it is part of the record on appeal.

smoked the substance, which the defendant told him was marijuana. The search warrant then issued for the defendant and his house.

The arresting officer, who was the only witness at the hearing, testified that he and three other officers went to the house with the warrant and entered forcibly because a man in the house would not let him inside.[2] A van, which never was searched, was parked in the driveway. After police searched the premises for about one and one-half hours and found nothing, the defendant and his wife returned home in an

---

2 About 18 hours elasped between the time the informant saw the alleged marijuana at the defendant's house and when the house actually was searched by the police.

automobile. As the defendant and his wife entered the house, the police confronted defendant and found plastic bags with what appeared to be marijuana and cocaine inside the briefcase defendant was carrying. They also found nearly $3,000 in the purse of defendant's wife. He next took the defendant's keys and went to the automobile. He unlocked the car door and found nothing inside the car, including the glove compartment; however, when he opened the trunk with the keys, he found two large plastic bags which apparently contained marijuana. A this point, although the defendant had already been arrested, his wife and the other man who was in the house were not taken into custody. The police learned that the car which was in the driveway about 25 feet from the house was registered to the defendant and his wife.

In ruling that the evidence seized in the search of the defendant's automobile trunk was inadmissible, the trial judge concluded that a warrant should have been obtained. In part, he found no exigent circumstances to justify such a warrantless search. He particularly emphasized that 10 to 15 minutes elapsed from the time the defendant was searched until the trunk was opened, that it was not clear at the time of the search that the defendant owned the car, and that the van in the driveway never was searched.

We must affirm the ruling of the trial judge. Initially, we note that the search warrant extended only to the defendant's person and his house. Although the police could have requested a warrant for the automobile as well, no mention whatsoever was made in any automobile in the warrant, even though the complaint for the warrant

specifically stated that the informat had said that the two bags of marijuana were carried from an "auto" to the defendant's house. Thus, once the defendant left the car and was arrested inside the house, the police had no justification for seizing his car keys, going outside to the car and opening the automobile trunk. No danger existed to the police or to the public, and so the search clearly was not authorized as incidential to arrest. Further, no evidence of any crime of its fruits was in plain view inside the car to justify a seizure. Also, the car itself was not a nuisance that first had to be removed from a public area and then searched. Here, another vehicle already parked outside the defendant's house was never searched. Nothing in their search of the house or in the defendant's arrest gave the police

additional grounds to suspect that contraband was in the car. The police did not learn until after they already had arrested the defendant, taken the keys, and searched the parked automobile that the car actually belonged to the defendant and his wife. Thus, we cannot say that the trial judge's ruling that the warrantless search was illegal was manifestly erroneous. (See People v. Clark, (1982), 92 Ill.2d 96, 440 N.E.2d 869; People v. Jones, (1977), 45 Ill. App.3d 307, 359 N.E.2d 856.) Although the State contends that the search was justified by the exigent circumstances that the contraband could have been destroyed if the police withdrew to obtain a warrant, we will not disturb the trial judge's ruling on this basis either. Because the car itself was parked and locked on a private driveway, and the

contraband was hidden from view in the trunk, there was minimal danger that a stranger might take the car or break into it and remove or destroy the evidence. The defendant himself already had been taken into custody. Although his wife or the other man in the house might have had access to the car (even though a set of keys had been seized), one of the officers could have remained to watch the parked car,[3] while the others left to request a search warrant for the car from the judge. Clearly, time was not the essence here; the police did not even search the car until 10 to 15 minutes after they initially seized the drugs and arrested the defendant. And there was no indications that obtaining

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3 However, the caselaw suggests that immobilizing the vehicle until a warrant was obtained would have been improper. See People v. Peter (1973), 55 Ill.2d 443, 303 N.E.2d 398.

another search warrant would have been particularly inpractical for the police. Thus, the circumstances were not so extreme as to justify the police in effectively eliminating the search warrant requirement, and thereby usurping the judicial function of determining whether probable cause existed to search the automobile. See Collidge v. New Hampshire (1971), 403 U.S. 443, 29 L.Ed.2d 565, 91 S.Ct. 2022. See also, Cady v. Dombrowski (1973), 413 US. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523.

According, the judgment of the circuit court is affirmed.

SULLIVAN, J. MEJDA, P.J. and LORENZ,J., concur.

APPENDIX B

Order of the Illinois Supreme Court denying leave to appeal in People v. Thomas Fogel (No. 60572, October 2, 1984).

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62706
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October 2, 1984

Hon. Richard M. Daley
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No. 60572 - People State of Illinois, petitioner, vs. Thomas Fogel, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above cited cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

THOMAS FOGEL,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether this case involves an issue also presented in the pending case of *Oklahoma v. Castleberry* (No. 83-2126, cert. granted, November 5, 1984)?

2.

Whether this case involves a substantial constitutional question relating to the automobile exception to the search warrant requirement?

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No. 84-894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

THOMAS FOGEL,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Thomas Fogel, respectfully prays that the Petition for a Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, entered on June 29, 1984, be denied.

JURISDICTION

Petitioner adequately sets forth the jurisdiction of this Court.

CONSTITUTIONAL PROVISION AT ISSUE

Petitioner adequately sets forth the constitutional provision at issue.

STATEMENT OF THE CASE

On December 27, 1982, at 9:15 p.m. City of Chicago Police Officer Robert Smith obtained a search warrant to search Thomas Fogel's person and his home which was located at 625 North Laramie, Glenview, Illinois. (R. 69)

The complaint for search warrant contained certain information that a confidential informant had related to Chicago Police Officer Robert Smith.

The complaint for search warrant indicated that on December 27, 1982 the confidential informant told Officer Smith that on that date he was in the company of the respondent. (R. 70)

The informant and the respondent went to the respondent's single family residence located at 625 North Laramie, Glenview, Illinois. (R. 70) After they arrived the respondent asked the informant to help him carry some bags into the respondent's home. (R. 70) The informant and the respondent then each took a large plastic bag from the trunk of a car and carried it into respondent's house. (R. 70-71) There is no information contained within the complaint for search warrant describing this automobile or even mentioning that it was owned by respondent. (R. 70-71)

Once inside the house, the informant removed some crushed green plant from one of the large plastic bags, smoked it, and received a "marijuana high." (R. 71) There is no information contained in the complaint for search warrant indicating that the two large plastic bags were ever taken from respondent's home. (R. 71)

On December 28, 1982 at approximately 3:00 p.m. Officer Smith and three fellow officers arrived at the respondent's home to execute the search warrant. (R. 16) As they arrived at the respondent's residence, the officers noticed a lone van parked in the driveway leading to a two-car garage at that address. (R. 17)

Respondent was not present at his home when the police arrived. An adult male was present who denied the officers entry. The police then forcibly entered the residence. (R. 18-19)

The officers searched the respondent's residence for an hour and a half; no contraband was uncovered. (R. 20)

As the officers were concluding their search, the respondent and his wife entered the residence. (R. 21-22)

Respondent's briefcase was searched and marijuana and cocaine were recovered. (R. 22-23) The officers searched the purse of the respondent's wife and recovered $2,865. (R. 28)

Officer Smith then took some car keys from respondent and used those keys to open a 1978 Mercury that was parked in the driveway, approximately 20-25 feet from the front door of respondent's residence. The car had not been present when the police officers arrived to execute the search warrant. (R. 12, 21-22, 25) Officer Smith searched the interior of the automobile and did not find any contraband. (R. 12) He then opened the trunk of the automobile

and recovered two large plastic bags filled with marijuana. (R. 12, 25) Ten to fifteen minutes had elapsed from the time the respondent was searched until the trunk of the 1978 Mercury was searched. (R. 30-31) It was only after the 1978 Mercury was searched that the police learned that the car was registered to the respondent and his wife. (R. 26)

The trial court suppressed the marijuana recovered from the trunk of the 1978 Mercury ruling, in part, that the police did not have probable cause to search the car. (R. 48-49) The State appealed from that decision.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT AN ISSUE ALSO INVOLVED IN *OKLAHOMA v. CASTLEBERRY*, NOW PENDING BEFORE THIS COURT.

Contrary to the petitioner's assertion, the issue in the instant cause does not involve the same issues presented in *Oklahoma v. Castleberry* (No. 83-2126, *cert. granted*, Nov. 5, 1984). Moreover, petitioner has misstated one of the issues involved in *Castleberry*.

In *Castleberry*, Oklahoma City Police Officer R.D. Taylor received an anonymous telephone tip from a previously unknown confidential informant. The informant told Officer Taylor that two men, one named Castleberry, were staying in a particular room in a particular motel, that they were driving a blue Thunderbird with Florida license plates and that they were carrying narcotics in

blue suitcases. The informant also provided physical descriptions of the two men.

Officer Taylor immediately proceeded to the location of the motel, observed a vehicle matching the description of the vehicle given him by the informant, and ascertained that Castleberry resided at the motel.

Several minutes later, Officer Taylor observed two individuals emerge from the named room at the motel and place several suitcases in the trunk of the described car. The suitcases also matched the informant's prior description.

Officer Taylor then announced his office and attempted to restrain the two men. One obeyed, but Castleberry closed the lid of the trunk, and threw a small white object into the car. Castleberry also shut the car door and locked it. Another police officer arrived, and, using the keys, retrieved the white object (a Band-Aid box) from the interior of the car, and retrieved the suitcase from the trunk of the car. The Band-Aid box and the suitcases were searched and narcotics were found in each. *Castleberry v. State*, 678 P.2d 720, 722 (Okla. Crim. 1984). The trial court denied the defendants' motion to suppress, but on appeal the Oklahoma Court of Criminal Appeals reversed. That court held that the search was not justified as incident to a lawful arrest. *Castleberry v. State*, 678 P.2d 720, 723 (Okla. Crim. 1984). The petitioner, in the instant cause, does not attempt to justify the search of the 1978 Mercury under the search incident to lawful arrest theory.

The second rationale utilized by the Oklahoma Court of Criminal Appeals is misstated by petitioner when it states that "[t]he Oklahoma Court of Criminal Appeals ruled that

a warrant had been necessary to justify a search of the automobile." (Petition, page 10.)

The Oklahoma Court of Criminal Appeals held that a warrant was necessary to justify a search of the containers seized from the automobile. The Oklahoma Court of Criminal Appeals ruled that *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) governed the fact situation rather than *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

> The case at bar clearly falls within the *Chadwick-Sanders* line of cases. The suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw into the car. Accordingly, we hold that the motion to suppress was erroneously overruled. The officers should have detained the containers until a search warrant had been obtained. *Castleberry, supra* at 724.

Thus, the issue presented to this Court by *Castleberry* involves an analysis of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) and its interplay with the so-called container cases, *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The fact that the car in Castleberry was parked is immaterial to the issues in that case.

The crucial issues and facts in *Castleberry* and the instant case are far more different than similar.

In *Castleberry* the police receive a detailed description of the defendants' automobile as well as the containers in which the two defendants are carrying narcotics. The police officer goes immediately to the scene and observes

the described auto and the described containers being placed in that vehicle. His opening of the interior and the trunk of that vehicle in order to seize the containers are not at issue. It is only the opening of the containers themselves, without a search warrant, that is at issue.

By way of comparison, the officer in the instant case, receives information from an informant relating to the respondent and an automobile used to transport contraband. The automobile is not described in any manner. He cannot be sure that the automobile is owned by the respondent, as opposed to being borrowed or rented (or even owned by the informant.) There is no indication that he knows how many automobiles the respondent may own or rent. He is not even told who was driving the automobile at the time the narcotics were transported.

The officer is then told that 2 bags of marijuana are removed from the trunk of the automobile and taken by the respondent into his house. The informant never mentions seeing the bags ever leaving the house, much less being placed back in an automobile.

The police arrive at the respondent's house at least eighteen hours after they receive this information. They cannot verify, through their personal observation, that the respondent arrives in the same vehicle previously mentioned by the informant, because they have no description of the prior vehicle. They do not even observe the respondent arrive in the 1978 Mercury, much less place anything in that vehicle.

The primary issue in the instant case involves probable cause. Did the police have probable cause to open and search the 1978 Mercury parked in the respondent's driveway? *See* Argument II, *supra.* This issue is distinct from the issues in *Castleberry.* The secondary issue in the in-

stant cause involves whether the police needed a search warrant in order to open and search the 1978 Mercury. Because this case has been properly decided on the first issue (probable cause) this Court need not evaluate the second issue (need for search warrant). *See* Argument II, *supra*. As such, this Court should not accept the instant petition on the basis of *Castleberry*.

II.

THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION RELATING TO THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

The petitioner manufactures an issue when it states that this cause should be accepted by this Honorable Court in order to determine whether the automobile exception to the search warrant requirement applies to a parked automobile. (Petition, page 12).

Initially, it should be noted that this Court's case law makes it clear that, under some circumstances, the automobile exception to the search warrant requirement does apply to parked vehicles. *See, e.g., Caldwell v. Lewis*, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 96 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Thus, this Court does not have to accept this Petition in order to establish a rule of law since that rule of law has already been established through prior case law.

Most importantly, however, it is clear that this petition is not the proper one for this Court to accept in order to analyze the automobile exception to the search warrant requirement. The reason for this is that the facts of this case indicate that the police lacked probable cause

to search the respondent's car. The trial judge ruled that the police lacked probable cause to search the vehicle. (R. 48-49) The Illinois Appellate Court ruled that the police lacked probable cause to search the vehicle. (Appellate Court Opinion; See Petitioner's Appendix, page 6a).

When one analyzes the decisions of this Court involving the automobile exception to the search warrant requirement it is clear that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). As stated by this Court in *United States v. Ross*, 456 U.S. 798, 807-808, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982):

> In defining the nature of this "exception" to the general rule that '[i]n cases where the securing of a warrant is reasonably practicable, it must be used,' *id.*, at 156, 69 L.Ed.2d 543, 45 S.Ct. 280, the Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains contraband.
>
> . . . . .
>
> Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers.

In every one of the cases cited by the petitioner under the automobile exception to the search warrant requirement, the police had probable cause or other lawful justification to search the vehicles in question without search warrants. Moreover, the existence of probable cause was not an issue that this Court was asked to decide.

For instance, in *Colorado v. Bannister*, 449 U.S. 1, 3, 66 L.Ed.2d 1, 101 S.Ct. 42 "[p]robable cause . . . is self-evident." *See, e.g., Michigan v. Thomas*, 458 U.S. 259,

102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Caldwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

It is respectfully submitted that it is not appropriate for this Court to grant this petition in that the petitioner is requesting that this Court review the determination of a state trial court and a state appellate court pertaining to whether probable cause existed, given the facts of this individual case. Such a review does not constitute an important question of federal law. *See* Title 28 U.S.C. Rule 17(c). *Compare Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Assuming that this Court accepts this Petition in order to review whether probable cause existed, then respondent submits that the police did not have probable cause to believe any contraband was in the 1978 Mercury.

An analysis of the petitioner's case for probable cause indicates the total lack of probable cause.

> The fact that the officers did obtain a search warrant for respondent's house and person shows that the officers were not trying to evade the search warrant requirement. Moreover, the officers were justified in not seeking authority to search respondent's automobile at the time they applied for the warrant. Although the informant had seen respondent removing a large quantity of marijuana from the car the previous day, when the officers applied for the warrant they had no information indicating that any contraband was still in the vehicle. (R. 70-71) Also, neither the affidavit nor anything else in the record indicates that the informant supplied a description of the automobile. (R. 70-71) The application for the warrant had to give both a specific description of the

> place to be searched and information indicating that evidence was presently to be found there. Ill. Rev. Stat. 1971, ch. 38, sec. 108-1. When Officer Smith applied for a search warrant, such information was not available concerning respondent's automobile.
>
> But after respondent was searched and placed under arrest, there was probable cause to search his vehicle. The large quantity of marijuana seen by the informant had not been found in the house. The previous day respondent had transported the marijuana to the house in his car, and respondent had just arrived at the house in his car again. Smaller quantities of cocaine and marijuana were found on respondent's person, and several thousand dollars were found in his wife's purse. Thus the officers searched respondent's automobile as soon as they acquired probable cause to believe that it contained contraband.
>
> Here the officers, after they acquired probable cause, searched an automobile which had just been parked and left by respondent. This Court should accept jurisdiction in order to resolve the important question of whether the automobile exception to the search warrant requirement applies to such searches.

Petition, pages 19-21.

First, the petitioner states that "the informant had seen respondent moving a large quantity of marijuana from *the* car the previous day . . ." (emphasis added) (Petition, page 19) This is an incorrect recital of the facts. The complaint for search warrant indicates that the respondent removed a quantity of marijuana from a car. It was never stated that the car was respondent's car, much less the 1978 Mercury eventually searched. Petitioner never entertains the notion that people own more than one car (respondent's house had a two-car garage) or that people rent or borrow cars.

The petitioner is correct when it states that the police officers did not have any information to indicate any contraband was still in the vehicle at the time application was made for the search warrant. (Petition, page 20)

According to petitioner, two factors give rise to probable cause to search the 1978 Mercury. First, respondent was searched in the house and narcotics were found in his briefcase. Secondly, no large quantity of marijuana was found in the house.

How these two factors give rise to probable cause to search the 1978 Mercury is never explained. Presumably, in eighteen hours time, the marijuana could have been taken to many different places in many different vehicles. The police have no information indicating that the 1978 Mercury is the same car previously mentioned by the informant. At the time that the police search the 1978 Mercury they have not even verified that the car is the respondent's. They did not even see the respondent and his wife get out of the 1978 Mercury before they enter the house. No one sees any large plastic bags ever being placed in the Mercury.

In conclusion, it is clear that the police did not have probable cause to search the 1978 Mercury. Based on the evidence presented, the decisions of the courts below that no probable cause existed to search the 1978 Mercury were not clearly erroneous. The petition for certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the respondent respectfully submits that the Petition for a Writ of Certiorari not be granted.

Respectfully submitted,

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APPENDIX

State of Illinois
County of Cook—ss.

The Circuit Court
of Cook County

COMPLAINT FOR SEARCH WARRANT

[Filed December 30, 1982]

Robert E. Smith #15578 Complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of "Tommy" Male/White Approx.30yrs. 5'8 130lbs. Brn.hair and 625 N. Laramie House Glenview, CookCounty,Ill. and seize the following instruments, articles and things: Marijuana: to wit Cannabis Sativa & Proof of Residency which have been used in the commission of, or which constitute evidence of the offense of Possession of Marijuana.

Complainant says that he has probable cause to believe, and based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

I, Robert E. Smith a Police Officer for the City of Chicago had a conversation with a reliable informant relative to marijuana on 27 Dec 1982. This informant related to me that on 27 Dec 1982 this informant was in the company of a male white subject known to this informant as Tommy. This informant described Tommy as a male white approx.30yrs. 5'8 130lbs. with brown hair. The informant related that while in the company of Tommy, Tommy and this informant went to the location of 625 N. Laramie Glenview,Cook County,Ill. were the informant related is a single dwelling house. The informant related that upon arriving at 625 N. Laramie Glenview,Cook County,Ill. Tommy told the informant that this is were I live. At this time the informant related that Tommy told the informant to go to the trunk of the auto to help him carry some bags into the house. At this time the informant related that Tommy and this informant both carried a large green plastic bag into this house located

at 625 N. Laramie Glenview,Cook County,Ill. The informant related that Tommy took keys from his coat pocket and unlocked the frontdoor of this residence at which time Tommy along with this informant entered into this house. Once inside this house the informant related that upon looking into these two green plastic bags the informant found them to contain several pounds of crushed plant. The informant related that while looking into these two green plastic bags Tommy told the informant that this was high grade reefer. With this the informant related that this informant took a small quantity of this crushed plant from each green plastic bag and smoked it at which time this informant related that a marijuana high was received. This informant knows a marijuana high in that this informant has been smoking marijuana for approx.two years on a regular basis up to the current date. The informant related that after a period of time this informant left Tommy's house at 625 N. Laramie Glenview,Cook County,Ill. at which time this informant related that Tommy had under his control two green plastic bags of marijuana that this informant observed and smoked a small quantity from. I have known this informant for approx. twelve months and since November of 1982 alone this informant has given me information on three separate occasions at which time cannabis and or controlled substance were recovered on each occasion with a positive lab report on two occasions and a positive field test on the third occasion. A lab report on the third occasion hasn't of yet been received. Arrests were made on all occasions.

/s/ Robert E. Smith
Complainant

Subscribed and sworn to before me on 12-27-82.

/s/ [Illegible]
Judge

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT
[Filed December 30, 1982]

On this day Robert E. Smith #15578, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search "Tommy" Male/White Approx.30yrs. 5'8 130lbs. Brn.hair 625 N. Laramie House Glenview,Cook County,Ill. and seize Marijuana: to wit Cannabis Sativa & Proof of Residency which have been used in the commission of or which constitutes evidence of the offense of Possession of Marijuana. I further commend that a return of anything so seized shall be made without necessary delay before me or before Judge Zelezinski-Branch #25, or before any court of competent jurisdiction.

/s/ [Illegible]
Judge

Time and date of issuance 9:15 P.M. 12-27-82

I did execute this warrant within 96 hours from the time of issuance and is hereby returned to the court and executed.

/s/ Robert E. Smith
Officer

Date: 28 Dec 92

Office-Supreme Court, U.S.
FILED
MAR 1 1985
ALEXANDER L. STEVAS
CLERK

(3)

NO. 84-894

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF ILLINOIS
Petitioner,
vs.
THOMAS FOGEL,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, FIRST DISTRICT

PETITIONER'S REPLY BRIEF ON THE ISSUE OF CERTIORARI

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I.

THE PENDING CASTLEBERRY AND CARNEY DECISIONS OF THIS COURT BOTH INVOLVE THE QUESTION OF WHETHER THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT APPLIES TO A PARKED VEHICLE.

In the petition for a writ of certiorari petitioner noted that the issue

in this case is also involved in Castleberry matter, now pending before this Court. Oklahoma v. Castleberry, cert. granted, 105 S.Ct. 379 (Nov. 5, 1984) (No. 83-2126). Respondent has denied this. But in fact one of the questions in Castleberry is whether the automobile exception to the search warrant requirement applies to the search of parked and vacant vehicle.

It is true that the principal issue in Castleberry is whether a warrant was necessary to search certain containers recovered from the truck of a parked automobile. But to even reach that issue, it must first be decided whether the police officers had a right to search the parked vehicle at all. If the search of the automobile in Castleberry was legal, then the search of the automobile in this matter was legal.

It should also be noted that a search of a parked vehicle is at issue in the Carney matter, which has already been briefed and argued before this Court. California v. Carney, cert. granted, 104 S.Ct. 1589 (March 19, 1984)(No. 83-859). Carney involves the question of whether the automobile exception to the search warrant requirement applies to the search of a mobile home. But this Court's decision in that matter will shed light on the extent to which that exception applies to a parked vehicle.

At present the decisions of this Court do not make it clear to what extent the automobile exception to the search warrant requirement applies to a a parked and vacant vehicle standing on private property. It is true that a warrantless exterior search was upheld in the Caldwell decision and that a warrantless search of

an abandoned vehicle was sustained in the Cady matter. Caldwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). On the other hand, a warrantless search of a vacant vehicle was ruled to be unconstitutional in the Coolidge case. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In the pending Castleberry and Carney matters this Court will clarify the scope of the automobile exception to the search warrant requirement. It may then be possible to give this case a summary disposition. But some form of review should be granted in this matter, since it involves an important question which has not yet been fully resolved by this Court.

II.

THE QUESTION OF PROBABLE CAUSE IS IRRELEVANT TO THIS CASE, SINCE IT WAS NEVER CONSIDERED OR DECIDED BY THE COURT BELOW.

Respondent argues that the police lacked probable cause to search his automobile. That argument is a red herring, having nothing to do with the issues in this case. The question of probable cause is not before this Court, since it was never considered or decided by the Appellate Court of Illinois. In fact, the decision of the Appellate Court of Illinois assumed that the police officers had probable cause to believe that there was contraband to be found in respondent's automobile.

The decision of the Appellate Court of Illinois, holding that the search of respondent's automobile was unlawful, was based solely on the fact that the police failed to obtain a search warrant for the car. That court said:

> And there was no indication that obtaining another search warrant would have been particularly impractical for the police. Thus, the circumstances were not so extreme as to justify the police in effectively eliminating the search warrant requirement, and thereby usurping the judicial function of determining whether probable cause existed to search the automobile. (Petition, Appendix I, pp. 8a-9a)

At no point in its opinion does the Appellate Court of Illinois consider the question of probable cause or rule on

whether probable cause existed, so that question is not before this Court. This Court will ordinarily rule only on questions which have been decided by the court below. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973). Thus there would be no need for this Court to consider the issue of probable cause if review is granted in this matter. Respondent's arguments concerning probable cause therefore have nothing to do with the question of whether certiorari should be granted in this case.

The Appellate Court of Illinois held that a warrant is necessary to search a parked and vacant car, and that the automobile exception to the search warrant requirement does not apply to such cases. This holding was based on that court's

interpretation of federal constitutional law, since the Coolidge and Cady decisions of this Court were cited in support of it. Cady v. Dombrowksi, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This Court should correct this erroneous ruling, and may choose do so either through a summary disposition or through a remand for further consideration in the light this Court's pending decisions in the Carney and Castleberry matters. California v. Carney (No. 83-859, pending); Oklahoma v. Castleberry (No. 83-2126 pending). The question of probable cause may be left to further proceedings after remand.

In conclusion, the question of probable cause to search was never decided by the court below. Therefore, it is not involved in this case, and the sole ques-

tion before this Court is whether the automobile exception to the search warrant requirement applies to a parked and vacant vehicle.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this matter by the Appellate Court of Illinois, First District.

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